

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

BAKER BOTTS L.L.P.

Plaintiff,

v.

UNITED STATES SECURITIES AND
EXCHANGE COMMISSION

Defendant.

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Case No. 4:12-cv-3

ORIGINAL COMPLAINT

I. NATURE OF THE ACTION

1. Plaintiff Baker Botts L.L.P. (“Baker Botts”) brings this action under the Freedom of Information Act (“FOIA”), 5 U.S.C. § 552, for injunctive and other appropriate relief, seeking release of documents in the Defendant’s possession that the Defendant has improperly withheld.

II. PARTIES

2. Plaintiff, Baker Botts, is an international law firm with 725 lawyers and a network of 13 offices around the world. Baker Botts’s principal office and headquarters is located at One Shell Plaza, 910 Louisiana Street, Houston, Texas 77002.

3. Defendant, the United States Securities and Exchange Commission (“SEC”), is a department of the executive branch of the United States Government, and is an agency within the meaning of 5 U.S.C. § 552(f).

III. JURISDICTION AND VENUE

4. This Court has subject matter jurisdiction over this action and personal jurisdiction over the parties pursuant to 5 U.S.C. § 552(a)(4)(B). This court also has jurisdiction over this action pursuant to 28 U.S.C. § 1331.

5. Venue is proper in the Southern District of Texas pursuant to 5 U.S.C. § 552(a)(4)(B) because this is the judicial district in which the Plaintiff has its principal place of business and from which Plaintiff's FOIA request was issued. Venue is also proper pursuant to 28 U.S.C. §1391(e) because the Defendant is an agency of the United States, the Plaintiff resides in this district, and no real property is involved in this action.

IV. FACTS

6. Prior to its bankruptcy and ultimate dissolution in November 2007, OAO NK Yukos ("Yukos") considered listing its shares on the New York Stock Exchange. *See* Ex. 1 at 5 (Record of Interview by Counsel of Bruce Misamore (certified July 7, 2009), *available at* <http://www.khodorkovskycenter.com/sites/khodorkovskycenter.com/files/Bruce%20Misamore%20Deposition.pdf>). As part of its decision making process, Yukos met with representatives of the Securities and Exchange Commission sometime between May 2002 and March 2003 to discuss the requirements for its shares to be listed on a U.S. exchange and to be registered with the SEC. Also present at the meeting(s) were Yukos's auditors, Pricewaterhouse Coopers and its legal counsel, Akin Gump Strauss Hauer & Feld LLP. On information and belief, the topics of discussion were: disclosure and reporting requirements, including the appropriate assessment of reserves, the disclosure of potential issues related to the Yukos privatization, the affiliate status of several related entities, and taxation and transfer pricing issues facing Yukos.

7. The SEC has confirmed the existence of responsive records. On information and belief, these include: (1) SEC-created documents such as attendance lists, meeting minutes and notes, visitor logs, and similar documents; (2) communications between Yukos and the SEC that included information that Yukos provided; and (3) documents prepared by Yukos for SEC review, such as a “draft” F-1 that Yukos submitted to the SEC in March 2003 as well as drafts of other disclosure documentation submitted for “preliminary review.”

8. In testimony disclosed publicly, Mr. Bruce Misamore, former Yukos CFO and board member, stated that these documents disclosed Yukos’s “accounting, finance and governance practices, and its internal controls.” Ex. 1 at 5. Ms. Sarah Carey, a former Yukos board member testified similarly that this documentation, including the “draft” F-1, “had been submitted to the SEC for preliminary review.” *See* Ex. 2 at 12 (Record of Interview by Counsel of Sarah Carey (certified Mar. 16, 2009) *available at* <http://www.khodorkovskycenter.com/sites/khodorkovskycenter.com/files/Sarah%20Carey%20Deposition.pdf>). On information and belief, the preliminary submission was made and accepted despite the SEC’s policy not to accept or pre-clear any registration statements or other disclosures in advance of their public filing. Ultimately, Yukos never registered its shares or obtained a listing on any U.S. exchange, and, as noted, ceased to exist in 2007.

9. On February 18, 2011, Baker Botts submitted a FOIA request to the SEC pursuant to 5 U.S.C. § 552, requesting any and all documents relating to the meeting(s) and agreeing to pay for reasonable costs incurred. Ex. 3. On March 7, 2011, the SEC’s Office of FOIA Services returned a perfunctory boilerplate response asserting that the request was “not a proper FOIA request” because it did not “reasonably describe” the records sought. Ex. 4.

10. On April 11, 2011, Baker Botts responded citing appropriate legal authority and explaining why the request was proper. Ex. 5.

11. Three days later, on April 14, 2011, the research specialist in charge of the request responded that he “was premature in [his] initial consideration of [the] FOIA request” and added: “My bad.” Ex. 6. Because of this premature rejection, request No. 11-04000-FOIA already had been closed. As a result, on April 14, 2011, the SEC opened a new request, No. 11-05724-FOIA. *Id.*

12. On July 7, 2011, the SEC finally responded with its findings. Ex. 7. The SEC had found responsive documents, but refused to release them. It invoked FOIA Exemption 4, asserting primarily that the release of the responsive information would “cause substantial competitive harm to the submitter.” *Id.* As a secondary justification, the SEC asserted that releasing the documents would adversely affect “governmental interests, such as compliance and program effectiveness.” *Id.*

13. By response letter dated July 21, 2011, Baker Botts explained that Exemption 4 did not apply to these documents, Ex. 8, because the criteria for withholding under Exemption 4 could not be met. 5 U.S.C. §552(b)(4); 17 C.F.R. § 200.80(b)(4). In short, Exemption 4 is inapplicable to agency-created documents because those documents were not “obtained from a person.” Moreover, the documents that the SEC obtained from Yukos or its agents are neither privileged nor confidential. Yukos ceased to exist in 2007,¹ and therefore cannot sustain competitive harm. Finally, because the SEC can compel this information from any potential registrant, the SEC’s interests in compliance and program effectiveness are not affected by the release of the documents.

¹ See, e.g., Dennis Zawacki II, *Yukos legally ceases to exist after Moscow court action*, JURIST LEGAL NEWS & RESEARCH (Nov. 22, 2007), <http://jurist.org/paperchase/2007/11/yukos-legally-ceases-to-exist-after.php>; *Yukos oil firm formally ceases to exist*, RIA NOVOSTI (Nov. 22, 2007), <http://en.rian.ru/business/20071122/89069523.html>.

14. On July 28, 2011, the SEC FOIA staff responded to Baker Botts's July 21 letter, refusing to reconsider its decision to withhold the documents, and instead inviting Baker Botts to "avail yourself of the appeal rights presented in our letter of July 7, 2011." Ex. 9.

15. On August 23, 2011, Baker Botts availed itself of those rights pursuant to 5 U.S.C. § 552(a)(6) and 17 C.F.R. § 200.80 (d)(5) and (6) by submitting a request for administrative review to the general counsel of the SEC. Ex. 10. Section 552(a)(6) allows the agency twenty days, excepting Saturdays, Sundays and legal public holidays, to respond to a request for administrative review.

16. The general counsel's office received the request for administrative review on August 29, 2011. Ex. 10. The SEC's twenty day clock for administrative review expired on September 29, 2011.

17. Despite reasonable efforts to cooperate with the SEC, Baker Botts has had no success in obtaining the review to which it is entitled, or the documents that are being improperly withheld. During October 2011, Baker Botts followed up on three separate occasions by telephone with the office of the general counsel. Each time, Baker Botts was told that its request was in the queue. On October 24, 2011 Baker Botts was told that its review request would be moved "to the top of the stack." On December 14, 2011, Baker Botts made a final attempt, via telephone, to obtain some movement on its request, only to be told that its request was still pending.

18. The SEC has exceeded the time allowed for responding to the request for review, and is in violation of 5 U.S.C. § 552(a)(6)(ii). Therefore, pursuant to 5 U.S.C. § 552(a)(6)(C)(i), Baker Botts has exhausted its administrative remedies.

IV. CAUSES OF ACTION

CLAIM ONE:

VIOLATION OF THE FREEDOM OF INFORMATION ACT

19. Plaintiffs restate every preceding allegation of this Complaint and incorporate each by reference as though set forth fully herein.

20. The SEC wrongfully withheld the records that it identified as responsive to Baker Botts's FOIA request under Exemption 4. First, records created by the agency, or received from another government entity, do not fall within the exemption and must be disclosed. Therefore, records such as minutes, meeting memoranda, attendance logs or similar documents created by the SEC should not be withheld in any event. Ex. 10 at 3.

21. Second, the SEC simply cannot meet its burden to show that the documents are confidential under Exemption 4. Documents are "confidential" and may be withheld under Exemption 4 only if disclosure of the documents would cause the submitter substantial competitive harm, or would adversely affect the agency's ability to collect such information in the future. Ex. 10.

22. Yukos, the submitter of the documents, cannot sustain *any* competitive injury, let alone "substantial competitive injury." Yukos no longer exists. Furthermore, the draft registration statement and other records that Yukos provided to the SEC for "preliminary review" and approval (*see* Exs. 1 and 2) comprised information that Yukos itself anticipated disclosing to the public. Disclosure of records containing information that a company itself planned to disclose cannot cause the company substantial competitive harm. Ex. 10 at 3-5.

23. The SEC's "program effectiveness" is similarly unaffected by the release of the documents. The applicable regulations mandate that companies disclose the type of information that Yukos provided the SEC. Therefore, no danger exists to the SEC's ability to

obtain this information from future registrants. Consequently, the SEC cannot meet its burden and the information cannot be withheld on the basis of this aspect of confidentiality under Exemption 4. Ex. 10 at 5.

24. The SEC therefore improperly invoked Exemption 4. Additionally, the general counsel's continued failure to respond to Baker Botts's request for administrative review constitutes an ongoing violation of FOIA.

CLAIM TWO:

RECOVERY OF ATTORNEY FEES

25. Plaintiffs restate every preceding allegation of this Complaint and incorporate each by reference as though set forth fully herein.

26. The SEC's failure to timely respond to Baker Botts's request has forced Baker Botts to bring this immediate action incurring costs and fees. Accordingly, pursuant to 5 U.S.C. § 552(a)(4)(E), Baker Botts is entitled to recover its costs and reasonable attorney fees.

PRAYER

WHEREFORE Baker Botts respectfully requests that this court enter an order:

1. Requiring the SEC to produce the documents in full within 10 business days of the Court's order;
2. Award Baker Botts its costs and reasonable attorneys' fees incurred in this action pursuant to 5 U.S.C. § 552(a)(4)(E); and
3. Grant Baker Botts all other relief that is just and proper.

Respectfully submitted,

BAKER BOTTS L.L.P.

By: /s/ Benjamin A. Geslison

Benjamin A. Geslison

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